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IN THE

Supreme Court of the United States

October Term, 1980

TEMPLE UNIVERSITY—OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION and THE HOSPITAL ASSOCIATION OF PENNSYLVANIA,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and HELEN O'BANNON,

Appellees

On Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, under Title XIX of the Social Security Act and the equal protection clause, a state Medical Assistance program may refuse to pay for necessary medical care in a category of care required to be included in such a program.

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Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and HELEN O'BANNON,

Appellees

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Temple University—Of the Commonwealth System of Higher Education ("Temple University") and The Hospital Association of Pennsylvania, the appellants, appeal from the judgment of the Supreme Court of Pennsylvania entered on June 19, 1980 holding that Pennsylvania Medical Assistance Regulation 9421.74(q) does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, Title XIX of the Social Security Act or the regulations thereunder.

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania has been reported at 415 A. 2d 413 (Appendix A1). The final opinion of the Commonwealth Court of Pennsylvania was reported at 47 Pa. Commw. Ct. 22 and 407 A. 2d 92 (Appendix A2). An earlier opinion of the commonwealth court in this action was reported at 30 Pa. Commw. Ct. 595 and 374 A. 2d 991 (1977).

JURISDICTION

This action in equity was filed as an original action in the Commonwealth Court of Pennsylvania. The judgment of the Supreme Court of Pennsylvania was entered on June 19, 1980 and the notice of appeal was filed on September 15, 1980, within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(2).

QUESTION PRESENTED

Whether, under Title XIX of the Social Security Act and the equal protection clause, a state Medical Assistance program may refuse to pay for necessary medical care in a category of care required to be included in such a program.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution:

[N]or shall any state . . . deny to any person within its jurisdiction equal protection of the laws.

STATUTES INVOLVED

42 U. S. C. § 1396a(a)(13)(D):

(a) A State plan for medical assistance must—

* * *

(13) provide—

* * *

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, consistent with section 1320a-1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the Secretary) included in the plan, except that the reasonable cost of any such services as determined under such methods and standards shall not exceed the amount which would be determined under section 1395x(v) of this title as the reasonable cost of such services for purposes of subchapter XVIII of this chapter.

REGULATIONS INVOLVED

42 C. F. R. § 440.230 (1979):

Sufficiency of Amount, Duration and Scope

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

Section 9421.74(q) of the Pennsylvania Medical Assistance Regulations:

Except as noted below, Medical Assistance payments are not made to hospitals either for specific noncovered services and procedures or for prolonged hospitalization which is not medically justified.

* * *

Prolonged hospitalization includes extended hospitalization for:

* * *

(q) Patients who no longer require acute patient care. However, the Department will make payment to the hospital for skilled nursing or intermediate care provided for a patient in a certified bed in a certified and approved hospital based skilled nursing or intermediate care unit. 7 Pa. Bulletin 2180 (August 6, 1977).

STATEMENT OF THE CASE

This class action was filed in the Commonwealth Court of Pennsylvania in 1976 by Temple University [1] as the operator of Temple University Hospital and a participant in the Pennsylvania Medical Assistance program, and by The Hospital Association of Pennsylvania. That program provides payment for medical care, including inpatient hospital care, to the indigent and receives federal financial assistance under Title XIX of the Social Security Act. 42 U. S. C. § 1396 *et seq.* (Supp. 1979); Pa. Stat. Ann. title 62, § 443.1(1) (Purdon). The defendants were the Pennsylvania Department of Public Welfare and its Secretary, Helen O'Bannon.

The action sought an injunction against the defendants' longstanding practice of not paying for inpatient hospital care provided to patients who were medically ready to leave the hospital but who were unable to do so because they required nursing home care and there was no nursing home bed available. The current regulation to that effect is Regulation 9421.74(q), effective August 15, 1977.

The issues in this action are the validity of Regulation 9421.74(q) under state and federal law including, in par-

1. Temple University operates a major inner city teaching hospital with the largest volume of Medical Assistance inpatients in Pennsylvania. The legal effect of the Pennsylvania Regulation at issue in this case is to transfer responsibility for payment from the Department of Public Welfare to the patient; the practical effect, in virtually every case, is to deny payment to the hospital. Thus, the commonwealth court held that Temple University, as a subrogee of its patients, had standing to assert their rights. 30 Pa. Commw. Ct. at 604, 374 A. 2d at 996. *See also Memorial Hospital v. Maricopa County,* 415 U. S. 250 (1974). Temple University's standing was not challenged before the Pennsylvania Supreme Court.

ticular, under Title XIX of the federal Social Security Act.[2] and the equal protection clause of the Fourteenth Amendment.[3] Plaintiffs' argument has been essentially that Regulation 9421.74(q) is invalid because it prevents payment to hospitals for inpatient care which is medically necessary and which hospitals must provide. The defendants' rejoinder was that the federal financial assistance under Title XIX was not available for such care and that, in any case, the Regulation permits payment to a hospital for care rendered to a patient in a hospital-based nursing home, *if* the hospital has one and *if* that nursing home has an appropriate vacancy.

After the Department of Health, Education and Welfare ruled that federal financial assistance was available, the plaintiffs moved for summary judgment arguing that the remaining issues were purely legal. The commonwealth court, in an opinion addressing plaintiffs' substantive arguments, denied plaintiffs' motion. Although the defendants had not moved for summary judgment, the commonwealth court entered judgment in their favor. (Appendix A8).

Plaintiffs appealed to the Supreme Court of Pennsylvania, which affirmed *per curiam*. (Appendix A1). Thus, the Pennsylvania courts have held Regulation 9421.74(q)

2. The issue of the conformity of Regulation 9421.74(q) with federal law was raised by the defendants at paragraphs 40-51 of their New Matter, filed at the same time the Regulation was promulgated, and was passed on by the commonwealth court in its final decision. (Appendix A7). Plaintiffs argued the issue to the supreme court at pages 16 through 19 of their brief.

3. Plaintiffs' complaint alleged, at paragraphs 33 through 35, that the Department's 1976 regulation violated the equal protection clause. The issue as to Regulation 9421.74(q) was argued on summary judgment to the commonwealth court and ruled upon by that court. (Appendix A6). Plaintiffs renewed their argument at pages 20 through 24 of their brief to the supreme court.

to be valid as against a challenge to its validity under both the United States Constitution and federal law. Because the Regulation was promulgated by the Department of Public Welfare pursuant to delegated legislative authority (Pa. Stat. Ann. title 62, §§ 201, 443.1(1) (Purdon)), review by the Court is by appeal under 28 U. S. C. § 1257(2). *See Atchison, Topeka & Santa Fe Ry. Co. v. Public Utility Commission of California*, 346 U. S. 346 (1953).

THE QUESTION IS SUBSTANTIAL

This appeal involves a question of central importance to the 49 states and the District of Columbia which receive federal financial assistance under Title XIX of the Social Security Act for medical assistance programs, to the over nine million recipients who receive over $18 billion in annual benefits under those programs,[4] and to the entire health care industry.

That question, on which this Court has never ruled, is whether a state medical assistance program can exclude from coverage necessary medical care in a category of care required to be included under Title XIX.[5] Two state

4. U. S. Bureau of the Census: *Statistical Abstracts of the United States 1979* (100th ed. Washington, D. C. 1979), Figures 557 and 558 [hereinafter "*Statistical Abstract*"].

5. This Court has previously ruled only on unique issues affecting a relatively small portion of the medical assistance beneficiaries and thus only a small portion of the potential medical assistance benefits. *See, e.g., Williams v. Zbaraz*, — U. S. —, 100 S. Ct. 2694 (1980); *Harris v. McRae*, — U. S. —, 100 S. Ct. 2671 (1980); *O'Bannon v. Town Court Nursing Center, Inc.*, — U. S. —, 100 S. Ct. 2467 (1980); *Beal v. Doe*, 432 U. S. 446 (1977); *Maher v. Doe*, 432 U. S. 464 (1977); *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974). The present appeal affects the rights of all of the beneficiaries and a substantial portion of the benefits paid.

supreme courts to which the question has been presented have issued directly contrary rulings. In addition, at least one federal court of appeals has issued an opinion on a related question which is contrary to the decision below.

Title XIX provides federal financial assistance to state programs providing medical care to the indigent. 42 U. S. C. § 1396 *et seq.* In order to qualify for federal assistance, a state program must provide five categories of care, including "inpatient hospital services". 42 U. S. C. §§ 1396a(a)(13)(B) and (C), 1396a(a)(17) and 1396d (a)(1).[6] However, by its Regulation 9421.74(q), Pennsylvania has determined that it will not pay for inpatient hospital care rendered to patients who are medically ready for discharge from a hospital to a nursing home and who cannot be discharged because there is no nursing home bed available. In other words, when a patient is medically ready to leave a hospital, Medical Assistance payment stops and the hospital must bear the burden of care caused by any shortage of nursing home beds. The Commonwealth Court of Pennsylvania, in an earlier action between Temple University and the Department, decided that "[i]n such circumstances there is still a medical necessity for the hospital services" and that to deny payment "would not further the purpose of the utilization review procedure". *Commonwealth of Pennsylvania, Department of Public Welfare v. Temple University—Of the Commonwealth System of Higher Education,* 21 Pa. Commw. Ct. 162, 166, 343 A. 2d 701, 704 (1975).

A state program which excludes from coverage necessary inpatient hospital care raises two federal questions:

6. The other required categories are outpatient hospital services, laboratory and x-ray services, skilled nursing facility services, early screening and diagnosis services, family planning services and physicians' services. 42 U. S. C. § 1396d(a). These services involved expenditures of $11.7 billion in fiscal 1978. *Statistical Abstract, supra,* note 4, Figure 558.

(1) "Serious statutory questions" which this Court specifically left unresolved in *Beal v. Doe*, 432 U. S. at 444.[7] Under Title XIX, a medical assistance program must include inpatient hospital care "sufficient in amount, duration and scope to reasonably achieve its purpose", must pay the reasonable cost of such care and may not reduce the duration of that care because of "diagnosis, type of illness or condition". 42 U. S. C. § 1396a(a)(13)(B), (C) and (D); 42 C. F. R. § 440.230(b) and (c).

(2) Serious questions under the equal protection clause of the Fourteenth Amendment because the exclusion of necessary inpatient hospital care means that some medical assistance beneficiaries are covered while others, in the same circumstances, are not. For example, in the present case, the Pennsylvania Medical Assistance program distinguishes (a) between patients in nursing homes and those in hospitals who have the same medical condition and who seek and require the same medical services and (b) between two classes of patients, each of which medically requires inpatient hospital care. Pennsylvania cannot refuse to pay "benefits necessary to basic sustenance" solely on fiscal grounds. *Memorial Hospital v. Maricopa County*, 415 U. S. at 263.

The question raised by this appeal is important not only because of the size of medical assistance programs and the number of persons who rely on them, but also because of the public interest in the costs and burdens of providing health care. Total medical assistance payments have increased from approximately $7 billion in calendar

7. This Court was not required to resolve these questions in *Harris v. McRae*, — U. S. —, 100 S. Ct. 2671 (1980) or in *Williams v. Zbaraz*, — U. S. —, 100 S. Ct. 2694 (1980) because of its conclusion that the Hyde Amendment constituted an amendment of Title XIX.

year 1972 to approximately $18 billion in fiscal year 1978.[8] "The soaring cost of medical assistance programs is a matter of national concern . . . ." *White v. Beal*, 555 F. 2d 1146, 1149 (3d Cir. 1977). Concern for these costs has led to reductions in the coverage of medical assistance programs.[9] This Court should make a definitive statement of the legal standard which states must use in determining which services they are required to provide.

The narrow question presented by this appeal is itself important because the supreme courts of two states have issued inconsistent rulings. The Pennsylvania court in this action ruled that Pennsylvania need not pay for inpatient hospital care rendered after the patient was medically ready to be discharged, but only to a nursing home, even if there was no available nursing home bed. In contrast, the Supreme Court of New Jersey, in *Monmouth Medical Center v. State*, 80 N. J. 299, 403 A. 2d 487, *cert. denied*, 444 U. S. 942 (1979), concluded that the New Jersey regulation prohibiting payment for inpatient hospital care under precisely the same circumstances violated Title XIX and 42 C. F. R. § 440.230(b).[10] Although the

8. Statistical Abstracts, *supra*, note 5, Figure 558.

9. During the nine months from October of 1975 to June of 1976, eighteen states reduced or temporarily cut back medical assistance coverage. *Data on the Medicaid Program: Eligibility, Services, Expenditures, Fiscal Years 1966-1977*, Prepared by the Staff for Use of the Subcommittee on Health and the Environment of the Committee on Interstate and Foreign Commerce, U. S. House of Representatives, March 1977, Table 5. During the first six months of 1978, six states did so. *Data on the Medicaid Program: Eligibility/Services/Expenditures*, 1979 Edition (Revised) U. S. Department of Health, Education and Welfare, Medicare/Medicaid Management Institute, Table 5.

10. "[W]e conclude that the State regulation here at issue is unreasonable and hence invalid even under the State's interpretation of federal requirements." 80 N. J. at 309, 403 A. 2d at 492.

New Jersey regulation does not mention hospital-based nursing homes, New Jersey, like Pennsylvania, permits reimbursement for the care they provide.[11]

The Pennsylvania Supreme Court decision is also inconsistent with a decision of the Third Circuit Court of Appeals. In *White v. Beal*, 555 F. 2d 1146 (1977), that court invalidated, under Title XIX, a Pennsylvania Medical Assistance regulation stating the medical conditions for which the program would pay for eyeglasses, holding: "The state plan's classification is arbitrary since it is based upon a factor not reasonably related to the medical need." 555 F. 2d at 1151.[12] The regulation at issue in *White* limited the coverage of the Pennsylvania program in a category of services not required by Title XIX. If a state cannot limit coverage in an optional category except on a basis related to medical need or utilization control, it cannot *a fortiori* do so in a required category. Thus, an inde-

11. Section 10:63-1.2 of the New Jersey Administrative Code provides that an eligible "intermediate care facility", "long-term care facility" and "skilled nursing facility" include identifiable parts of larger institutions. Counsel has confirmed, by a telephone conversation with Joanne Gibson, Esq. of the New Jersey Department of Human Services on September 10, 1980, that there is at least one "hospital-based" nursing home in New Jersey which receives medical assistance payments.

12. Other federal courts of appeals have similarly held that a state must select the services to be included in a medical assistance program on the basis of medical need. *Hodgson v. Board of County Commissioners*, 614 F. 2d 601 (8th Cir. 1980); *Zbaraz v. Quern*, 596 F. 2d 196 (7th Cir. 1979); *Preterm, Inc. v. Dukakis*, 591 F. 2d 121 (1st Cir.), *cert. denied sub nom., Preterm, Inc. v. King*, 441 U. S. 952 (1979). On the other hand, certain federal district courts have ignored medical need in cases involving the scope of medical assistance programs. *Virginia Hospital Association v. Kenley*, 427 F. Supp. 781 (E. D. Pa. 1977); *District of Columbia Podiatric Society v. District of Columbia*, 407 F. Supp. 1259 (D. D. C. 1975).

pendent reason why this Court should note probable jurisdiction is to resolve directly conflicting rulings of two state supreme courts and to resolve a conflict between a state supreme court and a federal court of appeals on the standard under which a state can exclude services from a medical assistance program.

In stating the issue presented by this appeal, we have been mindful of the arguments of the appellees that Regulation 9421.74(q) is valid because it permits payment to a hospital for care provided in a hospital-based nursing home and the statement of the commonwealth court that the Regulation relates merely to the manner of reimbursement.[13] (Appendix A5). We believe that neither addresses plaintiffs' objection to the Regulation nor supports the actual holding of the Pennsylvania courts. Specifically:

1. This action challenges Pennsylvania's Regulation only to the extent that it prohibits payment for inpatient

13. A medical assistance program cannot pay for care in the acute care facilities of a hospital at the rate approved for nursing homes. In order to be eligible for payment at a nursing home rate (either skilled care or intermediate care), a hospital-based facility must be a distinct part which meets separate requirements and is separately licensed. 42 C. F. R. §§ 440.40, 440.150. Moreover, in order for a hospital to receive payment for the reasonable cost of inpatient care, it must receive payment at the full inpatient rate for all days. The reason for this is that Medical Assistance pays for each inpatient day at a rate equal to the average cost for all inpatient days. The effect of this formula can be demonstrated by a simple mathematical example. If a hospital had only two inpatients, one receiving acute care at a cost of $300 per day, and one awaiting transfer to a nursing home whose care cost $100 per day, its total cost per day would be $400 and its average daily cost per inpatient would be $200. Under the Medical Assistance program, the hospital would receive $200 for the first (*i.e.*, acute care) patient. In order to receive full payment for both patients, it would have to receive $200 for the second (*i.e.*, the one awaiting transfer).

hospital care when a patient remains hospitalized because no nursing home bed is available. Appellees concede that the Regulation has this effect. A premise of the challenge is that, from time to time, a nursing home bed *is not* available. It is no answer to state that the Department of Public Welfare will pay for care in a nursing home if a nursing home bed *is* available.

2. The defendants' argument, and the statement of the commonwealth court, assume (a) that every hospital could establish a hospital-based nursing home and (b) that, if it did, it could obtain reimbursement for all of the patients whom it is unable to discharge because a nursing home bed is not available. A myriad of factual issues is covered by these assumptions.[14] In support of their posi-

14. Among these assumptions are the following:

1. The hospital has the physical resources to establish a nursing home. A hospital-based nursing home must be either a distinct portion of the hospital or "on the immediate grounds of" the hospital. Pennsylvania Medical Assistance Regulations 9424.6(1)(b) and 9425.12(b); 9 Pa. Bulletin 428 (February 3, 1979).

2. The hospital has the financial resources to establish a nursing home. It is well recognized that many private non-profit hospitals are in precarious financial straits. *See Memorial Hospital v. Maricopa County*, 415 U. S. at 264.

3. The hospital's proposal for a nursing home would be found to be satisfactory by all of the regulatory agencies and such agencies, including the local health planning agency, the state Department of Health, the state Department of Labor and Industry, the state Department of Public Welfare and the federal Health Care Financing Administration, would grant the required approvals. In order to obtain the maximum reimbursement for its nursing home services, the hospital must substantiate to the Department of Public Welfare that it is economically feasible to operate distinct part skilled nursing and intermediate care facilities. Pa. Medical Assistance Regu-

tion, the defendants offered only the fact that 29 out of the 270 hospitals participating have established nursing homes under the defendants' former regulations. *See* Appendix A6. This scanty evidence did not provide the commonwealth court or the supreme court with any basis to make findings of fact on any of the issues raised and neither did so. Thus, in holding Regulation 9421.74(q) valid as applied to a class of hospitals participating in the Pennsylvania Medical Assistance program, the Pennsylvania courts have determined that a Medical Assistance program, under state and federal law, need not provide inpatient hospital care whenever it is medically required and that a Medical Assistance program could refuse to pay for such care when nursing home care was appropriate but unavailable.

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14. (Cont'd.)

lations 9424.7121 and 9425.9111; 8 Pa. Bulletin 2828, 2831 (October 14, 1978).

4. The hospital could continue to comply with all of the many regulatory requirements for nursing homes. *See, e.g.*, 42 C. F. R. §§ 405.1101-405.1137; Pennsylvania Medical Assistance Regulations 9424.6 and 9425 and 28 Pa. Code Chapter 201. The complexity of these requirements and the difficulty in meeting them was a factual premise of this Court's decision in *O'Bannon v. Town Court Nursing Center*, — U. S. —, 100 S. Ct. 2467 (1980).

5. There would be vacancies in the hospital-based nursing home at the appropriate time. In order to be eligible for medical assistance reimbursement, a nursing home in Pennsylvania must be open to the general public. Pennsylvania Medical Assistance Regulations 9424.6(1)(b) and 9424.12(1)(b). In areas where there is an acute shortage of nursing home beds (*e.g.*, Philadelphia and Pittsburgh) it is highly probable that a hospital-based nursing home would be full most, if not all, of the time.

6. The vacancy would be in a bed certified for the appropriate level of care for the patient involved, *i.e.*, skilled nursing or intermediate care.

CONCLUSION

For the reasons stated above, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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[J. 255]

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 68 May Term 1979

Appeal From the Decree of the Commonwealth Court at No. 1171 C. D. 1976

Entered: November 21, 1979

TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION and THE HOSPITAL ASSOCIATION OF PENNSYLVANIA, on behalf of itself and themselves and all others similarly situated,

Appellants

v.

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE and HELEN B. O'BANNON, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,

Appellees

OPINION

(Filed June 18, 1980)

PER CURIAM:

Decree affirmed.

Each party to pay own costs.

Mr. Justice Nix took no part in the consideration or decision of this case.

Mr. Justice Larsen dissents.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 1171 C. D. 1976

TEMPLE UNIVERSITY—OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION AND THE HOSPITAL ASSOCIATION OF PENNSYLVANIA, ON BEHALF OF ITSELF AND THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs

v.

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE AND HELEN B. O'BANNON, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,

Defendants

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE RICHARD DiSALLE, Judge
HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOHN A. MacPHAIL, Judge

ARGUED: September 11, 1979

OPINION

(Filed October 26, 1979)

OPINION BY JUDGE BLATT

Temple University and the Hospital Association of Pennsylvania (plaintiffs) initiated this equity action against the Department of Public Welfare (DPW) seeking to enjoin the implementation of certain DPW regulations. We have previously disposed of the DPW's preliminary objections, *Temple University v. Department of Public Welfare,* 30 Pa. Commonwealth Ct. 595, 374 A. 2d 991 (1977) (*Temple II*), and before us now is the plaintiffs' motion for summary judgment.

Specifically at issue is the DPW's policy regarding the reimbursement of hospitals for expenses incurred in caring for Medical Assistance patients for whom some care is necessary but for whom acute care in a hospital is unnecessary and for whom space cannot be found in available skilled nursing or intermediate care facilities.

Previous DPW regulations had allowed it to deny reimbursement or to authorize reimbursement in whole or in part when such misutilization of facilities occurred. We held, however, in *Department of Public Welfare v. Temple University* 21 Pa. Commonwealth Ct. 162, 166, 343 A. 2d 701, 704 (1975) (*Temple I*), that:

> "where a patient may no longer be in need of continued acute hospital care but does need some lower level care, . . . it would be an abuse of administrative discretion to deny reimbursement to hospitals which have diligently put forth every effort to locate, without success, an appropriate lesser care facility . . . ."

Subsequently, the DPW adopted the regulation now in dispute, which provides as follows:

> "Except as noted below, Medical Assistance payments are not made to hospitals either for specific noncovered services and procedures or for prolonged hospitalization which is not medically justified.
>
> ". . . .
>
> "Prolonged hospitalization includes extended hospitalization for:
>
> ". . . .
>
> "(q) Patients who no longer require acute patient care. However, the Department will make payment to the hospital for skilled nursing or intermediate care provided for a patient in a certified bed in a certified and approved hospital base skilled nursing or intermediate care unit."
>
> Section 9421.74(q) of the Medical Assistance Manual, 7 Pa. B. 2180.

In essence, therefore, the DPW argues here that it will not now reimburse hospitals for acute care which is not "medically justified" but it will reimburse hospitals for skilled nursing or intermediate care at the rates established for such services but only if the hospital or a part thereof is certified to provide such services. The plaintiffs argue, however, that the currently applicable DPW regulation is (1) in violation of our previous decision in *Temple I*, (2) a violation of the constitutional guarantee of equal protection, (3) beyond the Department's authority, and (4) inconsistent with federal law.

As to our holding in *Temple I*, we decided that it was an abuse of administrative discretion for the DPW to deny reimbursement to a hospital which had made a diligent effort to find a lesser care facility. Under the regulations then in effect, however, the DPW had the discretion to

deny reimbursement. Here, the situation is different because there is no such discretion provided for in the currently applicable regulation. In reality, therefore, it is the manner of reimbursement rather than the refusal to reimburse which is here under attack, and we believe that the issues raised here are not controlled by our decision in *Temple I.*

As to equal protection, the plaintiffs argue that the current regulation distinguishes unreasonably between patients who require acute in-patient hospital care for purely medical reasons and those who receive such care because there is no suitable facility to which they can be transferred. We believe, however, that the regulation treats equally all Medical Assistance patients who require skilled nursing or intermediate care, reimbursement being made only at the rate established for the particular service and only when the care is provided by a certified facility. In addition, if the hospital is certified to provide the lesser care needed, the DPW will reimburse a hospital for patients who do not need acute care but who cannot be transferred. The plaintiffs, here, are unwilling to maintain lesser care facilities, yet they are demanding reimbursement at the rate established for acute care. They have not, however, been deprived of equal protection; on the contrary, the regulation is a reasonable attempt by the DPW to promote legitimate economic interests. Any disparity in reimbursement which results from the *application* of the regulation is brought about by the failure of the plaintiffs to comply with the rational standards for reimbursement which have been prescribed, and can hardly be considered invidious discrimination. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification . . . in practice . . . results in some inequality." *Dandridge v. Williams,* 397 U. S. 471, 485 (1970) (citations omitted).

As to the argument that the regulation is unreasonable and beyond the DPW's authority in that it attempts to coerce hospitals to operate skilled nursing or intermediate care facilities in order to obtain reimbursement for the patients who do not need acute care, we believe that there is no real coercion or duress here, for the plaintiffs need not participate in the Medical Assistance program at all. *Cf. Temple I, supra.* There is, moreover, no evidence before us that providing the services required would be unduly burdensome to the plaintiffs. In fact, we are informed by affidavit [1] that 29 hospitals in the Comwealth are now certified to provide skilled nursing or intermediate care.[2] We do not believe that the DPW has abused its authority in adopting the regulation in contention, for it is clear that the courts of this Commonwealth may not interfere with an administrative agency's legislative rulemaking power in absence of an abuse of power, *see Steward v. Department of Public Welfare,* 39 Pa. Commonwealth Ct. 530, 395 A. 2d 1043 (1979), and " 'it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse.' " *Uniontown Area School District v. Pennsylvania Human Relations Commission,* 455 Pa. 52, 77, 313 A. 2d 156, 169 (1973)

1. Affidavit of Michael A. Berchock, Chief of Reimbursement Methods Division, Department of Public Welfare.

2. The plaintiffs have submitted an affidavit which indicates that a majority of these hospitals would not qualify for certification under regulations recently adopted by the Department. This evidence is inconclusive, however, because it does not demonstrate either the difficulty the hospitals had with meeting the previous standards or the difficulty of meeting the new standards. We cannot conclude, therefore, on the basis of this evidence that certification and operation of such facilities is unduly burdensome to the plaintiffs.

(quoting *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232 (1936)).

Finally, as to the plaintiffs' assertion that the regulation in dispute is inconsistent with federal law, we are not convinced that the situation at issue here is covered by federal statute or regulations. While it may be covered under the regulations as to Medicare, to which the plaintiffs attempt to draw an analogy, we are dealing here with Medicaid, and the plaintiffs concede "a deficiency in current HEW regulations as to Medicaid on the subject." In fact, the argument of the plaintiffs can really be reduced to the proposition not that federal law is violated but that reimbursement by the DPW for acute care when a transfer cannot be made would not be inconsistent with federal law. Without considering further the complexities of the plaintiffs' argument, we believe it sufficient to note that they simply have not sufficiently demonstrated any inconsistency between the federal law and the regulation here in question.

We shall therefore deny the plaintiffs' motion for summary judgment.

GENEVIEVE BLATT
Genevieve Blatt, Judge

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 1171 C. D. 1976

TEMPLE UNIVERSITY—OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION AND THE HOSPITAL ASSOCIATION OF PENNSYLVANIA, ON BEHALF OF ITSELF AND THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs

v.

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE AND HELEN B. O'BANNON, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,

Defendants

ORDER

AND, Now, this 26th day of October, 1979, the motion for summary judgment of Temple University and the Hospital Association of Pennsylvania is denied, and judgment is hereby entered in favor of the Department of Public Welfare and Helen B. O'Bannon.

/s/ GENEVIEVE BLATT
Genevieve Blatt, Judge

CERTIFIED FROM THE RECORD
OCT 26, 1979
FRANCIS C. BARBUSH
Chief Clerk

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 68 May Term, 1979

TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, and THE HOSPITAL ASSOCIATION OF PENNSYLVANIA, on behalf of itself and themselves and all others similarly situated,

Appellants

v.

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE and HELEN B. O'BANNON, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Decree of the Commonwealth Court be, and the same is hereby affirmed. Each party to pay own costs.

/s/ MILDRED E. WILLIAMSON
Deputy Prothonotary

Dated: June 19, 1980

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 68, May Term, 1979

TEMPLE UNIVERSITY—OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION and THE HOSPITAL ASSOCIATION OF PENNSYLVANIA, on behalf of itself and themselves and all others similarly situated,

Appellants

v.

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE and HELEN O'BANNON, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Temple University—Of the Commonwealth System of Higher Education and The Hospital Association of Pennsylvania, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania, affirming the Decree of the Commonwealth Court, entered in this action on June 19, 1980.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

/s/ MATTHEW M. STRICKLER
Peter M. Mattoon
Matthew M. Strickler
Arlene D. Fisk
Attorneys for Appellant
Temple University—Of the Commonwealth System of Higher Education

/s/ ROLAND MORRIS
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The Hospital Association of Pennsylvania

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Duane, Morris & Heckscher
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Dated: September 15, 1980

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

TEMPLE UNIVERSITY—OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and HELEN O'BANNON,
Appellees

CERTIFICATE OF SERVICE

Matthew M. Strickler, Esquire, hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for Temple University—Of the Commonwealth System of Higher Education, Appellant in the above matter; that on September 15, 1980, a copy of the foregoing Notice of Appeal was served by hand delivery on John A. Kane, Esquire, counsel for the Pennsylvania Department of Public Welfare and Helen O'Bannon, Appellees in the above matter, at his office at Room 323, Health and Welfare Building, Harrisburg, Pennsylvania 17120; and that on the same day a copy was filed with the Commonwealth Court of Pennsylvania by hand delivery to the Prothonotary at his office at 625 South Office Building, Harrisburg, Pennsylvania 17120.

Matthew M. Strickler